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IN THE

Supreme Court of the United States

October Term, 1957
No. 559

OWEN BANDY,

Petitioner,

vs.

MUNICIPAL COURT OF SAN ANTONIO JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, DIVISIONS ONE AND THREE, respectively,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, Division One, State of California.

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KENNETH M. LISKUM,
Associate Counsel.

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To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Owen Bandy, petitioner, prays that a writ of certiorari issue to review the judgment and orders of the Supreme Court of the State of California and the District Court of Appeal, Second Appellate District, Division One, of the State of California. The said judgment and orders are as follows:

(a) The Order of the Supreme Court of the State of California, entered August 13, 1957, which denied to petitioner herein, his petition for hearing in said court.

(b) The judgment filed June 17, 1957 by the said District Court of Appeal, which affirmed the judgment of the Superior Court, Los Angeles County, California, case No. 662061, filed and signed by the trial court on November 1, 1956 and entered on November 2, 1956, in Book 3184 at page 143, Books and Records of said Los Angeles County, California, printed in Appendix C, page 10, *infra*.

Reference to Official and Unofficial Reports of Opinions.

The trial court did not render a formal opinion. The Opinion of the said District Court of Appeal, affirming the trial court is printed in Appendix B hereto, pages 6-9 and is officially reported in 151 A. C. A. 809, 312 P. 2d 274. The Supreme Court of the State of California entered no opinion, either orally or in writing, when it denied the petition for hearing.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The judgment of the District Court of Appeal was filed on June 17, 1957. A petition for rehearing filed with the said District Court of Appeal, was denied (without opinion) on July 16, 1957. The petition for hearing then filed with the Supreme Court of the State of California was denied (without opinion) on August 13, 1957.

The jurisdiction of this Court is invoked under Title 28, Section 1257 (3) United States Code; and petitioner alleges that the following Federal questions are manifest and were raised in the courts below:

(a) Whether or not a state court may, by means of an illegal order of appointment, appoint so-called Official

Court Reporters to its court, and by means of such order, exclude Petitioner, a certified shorthand reporter, from appearing in said court and taking down notes when hired so to do by private litigants and attorneys.

(b) Whether or not a state court may, irrespective of the fact that it may have qualified official reporters, prevent a qualified and certified shorthand reporter from appearing in said court and making his living, by taking down notes, when hired so to do by private litigants and attorneys.

(c) Whether or not the state court, by the above-mentioned order, has not violated the Fourteenth Amendment to the Constitution of the United States in that it has prevented petitioner from following a lawful occupation—the right to work and make his living.

The Supreme Court of California is the highest court in law or equity in the State of California, from which a final decision could be had in these matters herewith presented.

Constitutional Provisions and Statutes Which the Case Involves.

Constitutional Provisions of the United States Constitution are Article VI and Article XIV of the Amendments thereto. Statutes are Sections 69941, 69943, 72194, and 72195 of the Government Code of the State of California; as well as Sections 274c and 1094 of the California Code of Civil Procedure.

These as well as the Points and Authorities elucidating the Fourteenth Amendment to the Constitution of the United States are attached hereto, Appendix "A".

Statement of the Case.

How the Federal Questions Were Presented.

Petitioner is now, and for many years prior hereto has been, a Certified Shorthand Reporter with offices in Huntington Park, California. For many years he has been hired by various lawyers in the community to take down proceedings in Respondent Court. However, when it came time for him to appear, as a Reporter of events occurring in said Courts, he and the lawyer who hired him, would be, and were informed that one, and only one firm of reporters, to-wit, Bob Stevens & Associates, would be permitted, by said Respondent Courts, to take down proceedings therein. Said Petitioner, and his lawyer clients were further informed that said Bob Stevens & Associates were the *Official* Court Reporters of said Court.

Petitioner thereupon filed his Petition for Writ of Mandate (first amended) in the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles on August 7, 1956. [Clk. Tr. pp. 1-11, incl.]

Said Petition, set forth a complete set of facts showing that he was entitled to relief against Respondent Courts in two respects: (1) that Respondent Courts be compelled to follow the Government Code and make Official Court Reporter appointments as set forth therein and (2) that Respondent Courts permit him to take down notes in said Court and thus earn his living when hired so to do by attorneys and litigants.

Attached to the Petition and hereto as Appendix "A", are the points and authorities relied on for the relief [Rep. Tr. pp. 8-11, incl.] with the Fourteenth Amend-

ment to the United States Constitution being specifically pointed out to the Court as the source of the right to work, make contracts and pursue lawful business without arbitrary restraint.

The Court issued an Alternative Writ of Mandate which failed to grant Petitioner any relief *re* his exclusion from said Court in the matter of taking notes and making his living; it did specifically order Respondent Courts to give examinations as required by the Government Code and pursuant thereto, appoint Official Court Reporters or show cause why they hadn't done so.

The Respondents' return to said Writ [Clk. Tr. pp. 15-22, incl.] in effect, merely stated that the Respondent Courts had appointed Official Reporters and showed, without question, that in making such appointments Respondent Courts had in no way followed the specific directions of the Alternative Writ. Said Return and Answer further failed to deny any material allegations of the Petition so they stand admitted.

Petitioner's position was and is that the Return and Answer (the truth of the facts therein were admitted) constituted no defense to the Petition.

The judgment of the Court [Rep. Tr. pp. 23-24] merely denied the peremptory writ prayed for and discharged the alternative writ.

Petitioner thereupon appealed to the District Court of Appeal, Second Appellate District, State of California. In his opening brief, reference was made to the relief asked in his Petition and the Points and Authorities upon which he relied including reference to those which contained explanations of the guarantees of the Fourteenth Amendment of the United States Constitution. (App. Op. Br. p. 7.)

The Opinion of the District Court of Appeal, attached hereto, Appendix B, completely ignores the issue as to whether or not Petitioner was entitled to a Writ of Mandate ordering Respondent Courts to permit him to take down notes therein when hired so to do by private litigants and attorneys.

This fact was pointed out to said District Court of Appeal in Petitioner's Petition for a Rehearing, pages 1 and 2 as follows:

PETITION FOR REHEARING.

Preliminary Statement.

Petitioner herein filed his Petition for Writ of Mandate to above respondent court wherein he asked the Superior Court to order respondent to do two things: (1) allow petitioner to appear before respondent courts and take down proceedings therein when hired to do so by attorneys and litigants, and (2) to give the examinations required by the Government Code of California leading to the legal appointment of *Official* Court Reporters for said respondent court.

Appellant has pointed out in his Reply Brief why he is a party beneficially interested under Code of Civil Procedure, Section 1086.

Appellant believes that the Honorable Justices of the District Court of Appeal erred in that (1) material facts were omitted from or incorrectly stated in the Opinion of said District Court of Appeal, and (2) that substantial legal issues raised in the briefs were not considered in the opinion. Petitioner respectfully requests that the matters hereinafter set forth be given consideration.

I.

Neither the Superior Court nor the District Court of Appeal Considered or Passed on Petitioner's Right to Appear in Respondent Court and Take Notes When Hired so to Do by Litigants and Attorneys.

The facts, not denied by respondents *re* this point, appear throughout petitioner's entire Petition, pages 1 to 6, Reporter's Transcript. The Points and Authorities *re* this point appear pages 10 and 11, Reporter's Transcript.

Yet the Honorable District Court of Appeal has either overlooked, or refused to rule on this point. This Honorable Court must not have considered these facts or points and authorities at all. Petitioner earnestly requests a consideration of them, and a ruling made.

Yet said Petition for a Rehearing was denied by said Court on July 16, 1957 without opinion, either oral or written.

In a Petition for Hearing before the Supreme Court of California, Petitioner pointed out, on page 7 of said Petition, the failure of the District Court of Appeal to rule on the Constitutional question involved in his Petition but said Supreme Court of California denied said Petition without Opinion on August 13, 1957.

Reasons Relied on for Allowance of the Writ.

It is obvious from the record and from the showing made in this Petition that Petitioner presented the Federal Question to the Trial Court for determination at the first opportunity, to-wit, in his Petition for Writ of Mandate (first amended) filed in said Court. That, although said Court did issue an alternative writ to

Respondent Courts herein, the part of the Petition setting forth Petitioner's qualifications, his contracts of hire, his points and authorities *re* the Federal Question raised and the portion of the prayer pertaining thereto, were all ignored.

> "Actual decision of the federal question in terms is not required. It is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate non-federal ground appears."

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States by Richard F. Wolfson, Philip B. Kurland, paragraph 65, pages 116-117.

> "Federal rights are denied as well by a refusal of the state court to decide questions presented as by an erroneous decision of them."

Paragraph 65, page 117, Robertson & Kirkham, *supra*, citing *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 282.

There was no non-federal ground upon which the California Courts' decision could be said to be based as these Courts failed to decide whether or not Petitioner was entitled to a writ permitting him to take notes in said Respondent Courts, but merely refused to see or pass on the question.

The Federal Question appears to Petitioner to be a substantial one. As set forth in his Petition to the Trial Court, he is but one of a great many of Court Reporters who were and are denied access to Respondent

Courts by the subterfuge that *Official* Court Reporters had been appointed. To this Petitioner has, all through the state Courts maintained that there were not and are not now *Official* Court Reporters in said Respondent Courts for the simple reason that they, nor any of them, were appointed by said Respondent Courts in conformity with the requirements of the Government Code of the State of California (see Appendix A, hereto attached). Furthermore, Petitioner contends that even if there were *Official* Court Reporters, properly appointed, that he cannot legally be excluded from said Courts when hired to take notes therein by private litigants and attorneys.

Argument.

It is unbelievable that in the United States of America one can apparently be excluded from peacefully pursuing a legitimate profession in one of our country's Courts, said Court having been created by law and supported by citizens who believe, and in most cases, rightly so, that their Courts are their bulwark against arbitrary, capricious and unconstitutional action or lack of action.

Said Respondent Court, in its Return and Answer to the Petition for the Writ of Mandate gave no real reasons why a peremptory writ should be denied but in effect said "We have appointed *Official* Reporters"—something which in reality they had not done as clearly shown by said Return.

Conclusion.

Let us believe, that in this great country of ours, it can be said, and truthfully, that the voice of every citizen, be he great or inconsequential, can be heard by the highest Court in the land. For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue out of said Court to the District Court of Appeal of the State of California above indicated.

Respectfully submitted,

WENDELL W. SCHOOLING,
Attorney for Petitioner.

KENNETH M. LISKUM,
Associate Counsel.

APPENDIX A.

I.

That portion of Article VI of the Constitution of the United States, which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

II.

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

III.

Points and Authorities.

69941. Phonographic Reporters for Superior Courts: Appointment. The judge or judges of any superior court may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the appointing judge or judges.

69942. Same: Evidence of Good Moral Character: Examination by Members of Bar. No person shall be appointed to the position of official reporter of any court unless there is satisfactory evidence of his good moral character, and unless he has been first examined as to his competency by at least three members of the bar practicing in the court. Such members shall be designated by the judge or judges of the court.

69943. Same: Qualifications and Test of Competency. Upon the request of the judge or judges of the court, the committee of members of the bar so designated shall examine as to qualifications any person whom the judge or judges wish to appoint as official reporter. No person shall be appointed to such position if the committee has not reported favorably upon his qualifications. The test of competency before such committee shall be as follows: The person examined shall write in the presence of the committee at the rate of at least 150 words a minute for five consecutive minutes upon matter not previously written by or known to him, immediately read it back to the committee, and transcribe it into longhand writing, plainly and accurately. It he passes the test satisfactorily the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members. The certificate shall be filed among the records of the court.

72194. Reporters for Municipal Courts. By order entered upon the minutes of the court, a majority of the judges of the municipal court may appoint as many competent phonographic reporters as the business of the court requires, to be known as official reporters of such court. The official reporters shall hold office during the pleasure of the judges of such court.

72195. Application of 69942-69953 and CCP 273 to Qualifications, Duties, Etc., of Official Reporters of Municipal Courts: Fee for Reporting Testimony and Proceedings in Contested Cases. Government Code Sections 69942 to 69953, inclusive, and Section 273 of the Code of Civil Procedure are hereby made applicable to the qualifications, duties, official oath, certification of transcripts and fees of official reporters of municipal courts, except that the fee for reporting testimony and proceedings in contested cases, except for official reporters of municipal courts where a statute provides otherwise, is twenty-five dollars ($25) a day. CCP 274c (Reporters for Municipal Courts.) Official reporters of a municipal court, or any one of them, must, at the request of either party or of the court in a civil proceeding, or on the order of the court in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court. (Am. Stats. 1955, ch. 1424 1.)

POINTS AND AUTHORITIES

Furthermore, Mandamus may be an appropriate remedy for an abuse of discretion, either to prevent or to rectify it. It may also be employed to correct an arbitrary action which does not amount to the exercise of discretion.

Vol. 55, *Corpus Juris Secundum*, par. 73, page 128.

Every person has the right to pursue any lawful business or vocation he may select and such right cannot be taken away from him without due process of law, and regulation of such right is justifiable only by the existence of exceptional circumstances. The right to engage in a useful and legitimate business may be regulated but not prohibited.

Vol. 16, *Corpus Juris Secundum*, par. 669, pages 1421 and 1422.

The right to labor or earn a livelihood in any legitimate field of industry or business, either in employment or independent trade or practice, is guaranteed by both the Fourteenth Amendment of the federal Constitution and by the more specific provisions of the state constitution. This economic prerogative is protected both as a valuable property right and as an adjunct of personal liberty.

It must, of course, be constantly borne in mind that the exercise of the right to engage in a lawful occupation, like every other right of person or property, may be regulated by law. However, aside from the fundamental right of the government to subject private property to taxation and to take such property in time of public necessity, calamity, or peril, the state's right to regulate harmless vocations is found in the police power alone.

11 *Cal. Jur.* 2nd, par. 197, pages 599, 600 and 601.

This liberty of contract, which includes contracts to work, contracts to employ, and liberty freely to make such contracts, means freedom from arbitrary restraint, not immunity from reasonable regulation to safeguard the public interest. But the power to restrict the right of private contract is strictly limited to police regulations in behalf of public comfort, health, safety, morals, and welfare.

11 *Cal. Jur.* 2nd, par. 198, pages 601 and 602.

The admission of an attorney to practice law, when regarded as a judicial act, cannot be enforced by mandamus. When at attorney has been admitted, however, mandamus lies to compel a judge to recognize the right of such attorney to practice in the court presided over by him.

Vol. 35, *Am. Jurisprudence*, Par. 270, page 37.

Where there is an abuse of discretion, that is, if it clearly appears that the lower court has decided arbitrarily and without reason, its decision may be undone through the office of the writ of mandamus.

Ryan v. Superior Court, 49 C. A. 71, 192 P. 1036.

The right to work is fundamental and enjoys the personal liberty guarantees of the Fourteenth Amendment to the Federal Constitution, and any unreasonable limitations that deprive qualified persons of equal opportunity to qualify for work is unconstitutional.

Terry v. Civil Service Commission et al., 108 Cal. App. 2nd, 861, 240 P. 2d 691.

APPENDIX. B.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Owen Bandy, Petitioner and Appellant, vs. Municipal Court of San Antonio Judicial District, Respondent. Civil No. 22315.

Filed: June 17, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County, Edward T. Bishop, Frank G. Swain, Kurtz Kauffman, Judges, denying a peremptory writ of mandate and discharging an alternative writ.

For Appellant: Kenneth M. Liskum.

For Respondent: Harold W. Kennedy, County Counsel. Wm. E. Lamoreaux, Assistant County Counsel.

The petition alleges that appellant is a certified shorthand reporter "fully qualified and entitled to appear in any and all courts of the State * * * when hired so to do by litigants or their counsel"; that over a four year period many lawyers have hired petitioner to so appear but have been "informed by the Clerk of the Municipal Court of San Antonio Judicial District that one, and only one firm of Court Reporters were permitted to appear and take down proceedings * * *, to-wit, the firm of Bob Stevens & Associates".

It is further alleged that "there is not now, nor has there ever been, since January 1, 1952, an Official Court Reporter of said court, and that there has been no "examinations testing the competency of any person or persons for the position", nor evidence of good character required, in accordance with the statutes. It is also al-

leged that by reason of the Court's order, "Petitioner has been forced to breach his contracts with said attorneys" and has been damaged in the sum of $80,000.00; that petitioner is the real party in interest; that said order is discriminatory and "is arbitrary, capricious and unlawful".

An alternate writ of mandate was ordered, commanding said court "to cause to be conducted, examinations and tests leading to the appointment of Official Court Reporter", or that cause be shown why the same has not been done. To this writ return was made alleging that on January 1, 1952, the judges of said Municipal Court appointed Bob Stevens and E. S. Brink as official court reporters, and that on August 10, 1956 in compliance with the alternative writ, the judges named this firm as official reporters; "that all of said persons have qualified, as required by law, to be official reporters" and that the "petitioner has never qualified as an official court reporter" pursuant to law. On this showing, and it having been stipulated that the facts stated in respondent's answer were true, the peremptory writ of mandate sought by petitioner was denied and the alternative writ discharged.

The judgment must be affirmed. In response to appellant's petition, an alternative writ of mandate required the Municipal Court in question to "cause to be conducted, examinations and tests leading to the appointment of Official Court Reporter". The return to this writ, the truth of which is conceded, shows that on August 10, 1956, the judges did appoint certain persons, but not appellant, to act as official reporters, and that such persons "have qualified, as required by law". The alternative writ could not and did not order the appointment of appel-

lant; it could only require the Municipal Court to act in the premises, which respondent has now done.

In respect to the persons appointed, Assistant County Counsel Lamoreaux informed the trial court, "I checked insofar as I could with the Los Angeles Municipal Court to see if any of those people had taken the examination there, and I found that four of them had taken the examination: Nelson, Way, Melman, and Yamada. The last three passed; Nelson did not pass. When I discovered that, I notified the respondent court that unless Nelson took another examination and qualified, he could not act as the official court reporter, and that therefore they would have to scratch him from the list." It was thereafter stipulated that "Frank Nelson's name should be stricken from the list."

As stated in the respondent's brief, "No mandatory duty is enjoined upon the judges of respondent court to appoint appellant an official court reporter. The appointment of official reporters of a municipal court lies solely in the discretion of the judges of that court. Section 72194 of the Government Code provides as follows: * * * 'By order entered upon the minutes of the court, a majority of the judges * * * may appoint as many competent phonographic reporters as the business of the court requires, to be known as official reporters of such court. The official reporters shall hold office during the pleasure of the judges of such court'. The provisions of that section are clearly wholly discretionary and no one person can claim any right to be appointed official reporter of any municipal court".

There is no merit in any of the appellant's contentions. No right of appellant has been violated, and no abuse of discretion has been shown. The fact that appellant

happens to be a stenographic reporter not chosen for the post of official court reporter provides no beneficial interest in the matter of appointment different from that of any other member of the public. After the issuance of the alternative writ, the respondents did show cause why a peremptory writ should not issue, and the latter was properly denied.

The judgment is affirmed.

DORAN, *J.*

We concur:

WHITE, *P. J.*

FOURT, *J.*

APPENDIX C.

In the Superior Court of the State of California in and for the County of Los Angeles.

Owen Bandy, Petitioner, vs. Municipal Court of San Antonio Judicial District, County of Los Angeles, State of California, Divisions One and Three, respectively, Respondent. No. 662 061.

Filed: Nov. 1, 1956.

JUDGMENT

The above entitled proceeding having come on regularly for hearing on September 27, 1956, in Department 22 of the above entitled court upon the petition for a writ of mandate (first amended) and the respondent's answer thereto, the petitioner appearing by Kenneth M. Liskum, his attorney, and the respondent appearing by Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Assistant County Counsel, and it having been stipulated by counsel for said parties that all of the allegations of respondent's answer are true, and the matter having been submitted, and the court having arrived at its decision;

Now, therefore, it is hereby ordered, adjudged and decreed that the peremptory writ of mandate prayed for be and the same is hereby denied and the alternative writ is discharged.

It is further ordered that each of the parties herein pay his own costs.

Dated this 1st day of November, 1956.

EDWARD T. BISHOP
FRANK G. SWAIN,
KURTZ KAUFFMAN
Judges.